United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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76-7476

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant - Cross Appellee

-against-

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees - Cross Appellants

NEWBURGER, LOEB & CO., a New York limited partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN and ROBERT L. STERN, as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF, as Executors of the Estate of Ned D. Frank, FRED PAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a partnership (formerly known as Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims - Appellants - Cross Appellees

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P/S

Docket No. 76-7476 and the following related appeals:

76-7486
76-7488
76-7489
76-7494
76-7495
76-7499
76-7500

REPLY BRIEF FOR NEWBURGER, LOEB & CO. AND OTHERS

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INDEX TO REPLY BRIEF OF APPELLANTS
NEWBURGER, LOEB & CO. AND OTHERS

Cases Cited

UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR NEWBURGER, LOEB & CO. AND OTHERS

Mr. Mandel's main argument with respect to jurisdiction rests on his contention that there is a logical connection between the churning claim asserted in the complaint and the

validity of the 1971 transfer to Newburger, Loeb & Co. Inc., because without the transfer plaintiffs could not have asserted the churning claim (pp. 90-98). He attempts also (pp. 99-102) to justify the counterclaims as "pendent" to the Ninth which rests on an alleged violation of the Sherman Act. Both contentions are fallacious.

We shall also deal briefly with Mr. Mandel's remarks about the Newburger, Loeb defendants.

POINT I

JURISDICTION CANNOT BE MADE TO REST ON A CHALLENGE TO THE ASSIGNMENT.

Mr. Mandel argues (p. 92) that since it was appropriate for his clients to deny the validity of the assignment, therefore it was also appropriate for them to assert counterclaims to recover their capital accounts. But their right to the return of their capital accounts could not be affected by the assignment. These rights derived from the partnership agreement and, as between them and their partners, could not be affected by the assignment to which they had not agreed.

Moreover, Mr. Mandel completely ignores our contention (Main Brief, Point I, pp. 6-9) that Gross had no standing to question the validity of the transfer to the corporation as he was no longer a partner at the time. Without standing

to question the validity of the assignment, all arguments presented by his counsel fall flat on their face.

The cases cited do not help Mr. Mandel. In all of them there was a direct connection between the subject matter of the complaints and the subject matter of the counterclaims. Here there is none whatsoever.

In Moore v. New York Cotton Exchange, 270 U.S. 593, cited on page 93 and discussed on the next page, both complaint and counterclaims related to the supplying of a quotation service. We reject Mr. Mandel's attribution to us (p. 94) of the belief that these matters are unrelated.

In Great Lakes Rubber Corporation v. Herbert Cooper Co., Inc., 286 F.2d 631 (cited on p. 95), there was a counterclaim to a counterclaim. Involved were charges of violations of the Sherman Act and unfair business practices in the relations of the parties during the same time period. Here the complaint rested on matters that occurred between Gross & Co. and its customers years before any of the matters alleged in the counterclaims, which had nothing to do with either Gross & Co. or its customers.

The reference to United States v. Heyward-Robinson Company, 430 F.2d 1077 (cited on p. 96) is misleading. While separate contracts were involved they were tied together, as

we noted in our discussion of that case (Main Brief, p. 11).

In discussing the contention made by other counsel with regard to malicious prosecution (pp. 96-99), Mr. Mandel forgets that jurisdiction was upheld by Judge Ward solely on the ground that the counterclaims were defenses (365 F. Supp. 1364,67). If, on their face, these counterclaims could not be defenses, then the Court below had no jurisdiction of them. That is not, as Mr. Mandel suggests (p. 96), a decision on the "merits" but a decision on sufficiency, not as a possible claim but as an asserted defense. The cases cited by other counsel on this subject are, therefore, pertinent and controlling. The cases cited by Mr. Mandel (pp. 97, 98) have no bearing whatever since it was not claimed in any of them that the counterclaims could be justified as defenses.

Mr. Mandel can get little comfort from his reliance (p. 98) on Vernon J. Rockler & Co. Inc. v. Minneapolis Shareholders Co., 69 FRD 1. For there, both the complaint and the counterclaims related to the same subject matter - the rights of shareholders of defendant. The Court ruled only that both complaint and counterclaims involved the same transaction, the sale of certain assets (p. 4).

The contention (p. 99) that United Artists Corp. v. Masterpiece Productions, 221 F.2d 213, is "precisely in point"

is not warranted. In that case the Court was dealing with a situation not unlike that in Great Lakes. There this Court accepted the contention that there might be an estoppel because of improper practices by plaintiff and the counterclaim defendants. In that case both complaint and counterclaim dealt with alleged unfair trade practices in connection with the licensing of motion pictures, and the acts which it was claimed constituted an estoppel were part of the unfair trade practices. Here the acts claimed to constitute estoppel were acts (or failure to act) of the partnership during the time when the alleged churning was supposed to have taken place, acts which had nothing to do with the 1971 transfer or the capital accounts of Gross, Bleich and Donoghue on which the counterclaims rest. The discussion of United Artists Corp. on page 55 ignores the fundamental distinction between that case and the case at bar.

It is irrelevant that jurisdiction exists under the anti-trust laws to sue or counterclaim since the counterclaims here in question did not rest on the anti-trust laws. Cases such as Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172, and Hospital Building Co. v. Trustees of the Rex Hospital, 425 U.S. 738 (cited p. 56), have nothing to do with our problem.

The long and short of it is that the First, Second and Fourth Counterclaims have nothing to do with the churning claim asserted in the complaint and could not be defenses to that claim, and certainly that Mr. Gross had no standing to challenge the validity of the assignment. These counterclaims should be dismissed for lack of jurisdiction.

POINT II

THE ARGUMENT (pp. 99-102) THAT THE FIRST, SECOND, THIRD OR FOURTH COUNTERCLAIMS CAN BE SUSTAINED AS "PENDENT" TO THE NINTH IS WHOLLY FALLACIOUS.

The contention (p. 101) that the appellants refused to allow Gross to take employment with Rafkind unless he agreed to the transfer has to do only with motive, and that is neither a defense nor actionable (see cases cited in our Main Brief, pp. 16, 17).

There simply is no such connection between the First, Second, Third or Fourth Counterclaims as to suggest that they are pendent. Moreover, even if otherwise pendent they should have been dismissed because of lack of merit in the Ninth Counterclaim to which it is argued they are pendent. See Tully v. Mott Supermarkets, 540 F.2d 187, 196 (3d Circ. 1976).

POINT III

THERE IS NO MERIT TO THE CLAIM (pp. 102-105) THAT THE COURT BELOW HAD JURISDICTION OF THE THIRD COUNTERCLAIM AS COMPULSORY OR PENDENT.

The fact that the merits of the third counterclaim were tried as a potential set-off is immaterial. On that basis the distinction between compulsory and permissive counterclaims would be blotted out. In every instance where a set-off is allowed the Court would have jurisdiction of it as a counterclaim. That simply is not the law.

And surely there is no connection between the alleged conversion of Gross's warrants in 1970 or 1971 and the churning of the accounts of Gross's customers between 1962 and 1966 before Gross became a partner of Newburger, Loeb & Co.

While a Court must always be satisfied that it has jurisdiction, the cases cited on pages 104 and 105 do not support Mr. Mandel's contention that when one judge has ruled there is no jurisdiction another judge can say there is. The converse is, of course, another matter and that is all these cases decide.

POINT IV

WITH REGARD TO NEWBURGER, LOEB APPELLANTS

Mr. Mandel's discussion of the appeal of the Newburger, Loeb partners (pp. 88-90) is disingenuous, to say the least. He has nowhere referred to anything in the record to suggest that they did anything other than participate in the transfer to the corporation. And even if that was wrongful, Mr. Gross has no standing to complain (see our Main Brief, Point I, pp. 6-9).

The reference (p. 68) to the profits supposed to have been made by Kayne and Muh is not supported by a reference to the record. Mr. Risher testified that he bought their interests to protect his own (A. 3029-32).

The statement that Judge Owen found that appellees would have been paid in full on liquidation is also not supported by any reference, but on page 46 there is a reference to P. 539, Judge Owen's opinion. An examination of that reference discloses that this is a misstatement of what Judge Owen said in his opinion. He there said only that there would have been assets sufficient to repay Bleich and Donoghue. With regard to Gross he said only that his capital was then due, not that it could have been paid.

Moreover, Judge Owen's conclusion rested on his uncritical rewriting of the balance sheet on the basis of the Lauterbach testimony. That has no rational support in the evidence, as pointed out by the briefs of Finley, Kumble (pp. 70-78) and of Paul Risher (pp. 32-38). Mr. Mandel's answer to their argument (pp. 110-117) is utterly unconvincing.

Indeed, there is nothing in the record to support the conclusion that anything would have been available for partners had there been a liquidation following the suspension by the Stock Exchange on February 12, 1971. On the contrary, all the evidence points the other way. The details were set forth by Paul Risher in his main brief (pp. 23-28) and need not be repeated here.

Moreover, Lauterbach, on whose testimony (A.2542-64) Judge Owen relied (P. 530), did not testify that money would have been available for the partners had the firm been liquidated after the suspension. He merely dealt with Gross's capital account. He did not take into consideration the contingent liability on outstanding leases had there been liquidation. That would have been a considerable sum. The annual rent (not including One State Street which had been settled in 1970, but on which $240,000 still remained due - see E. 952) was over $500,000 and the total obligation over $3,000,000 (E. 241).

It was, therefore, improper for Mr. Mandel to state that Judge Owen had found that any of the partners could have been paid out on forced liquidation. He certainly did not say so as to Gross. And there is nothing in the record to support such a conclusion.

Mr. Mandel still has not shown that any of the general partners did anything wrong which could form the basis of a charge of conspiracy.

CONCLUSION

The First, Second, Third and Fourth Counterclaims should be dismissed for lack of jurisdiction, or the judgment against the Newburger, Loeb appellants should be reversed and the couterclaims against them dismissed on the merits.

Respectfully submitted,

OSMOND K. FRAENKEL
Attorney for Newburger, Loeb & Co.,
and others

STATE OF NEW YORK)
SS:-
COUNTY OF NEW YORK)

DOROTHY GANGEL, being duly sworn, deposes and says that she is not a party to the within action, is over 18 years of age, and resides at 85-55 115th Street, Richmond Hill, New York 11418.

That on March 31, 1977, deponent served two copies of the annexed Reply Brief for Newburger, Loeb & Co. and Others in the within action on each of the following attorneys for the respective parties at the addresses designated by said attorneys for that purpose by depositing true copies of same enclosed in postpaid properly addressed wrappers in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York:

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Sworn to before me this
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Alan M. Eisenberg

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Notary Public, State of New York
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Commission Expires March 30, 1978